MAY 31 1985

ALEXANDER L. STEVAS,
CLERK

No. 84-1761

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

THE TIMBERLANE LUMBER COMPANY, DANLI INDUSTRIAL, S.A., MAYA LUMBER COMPANY, S. de R.L., JORGE LIMA, MIGUEL ARDON, and GORDON SLOAN SMITH,
Petitioners,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, BANKAMERICA CORPORATION, PEDRO CASANOVA e HIJOS, S.A., IMPORTADORE MAYORISTA, S. de R.L., MICHEL CASANOVA, NASSER BONHEUR, MANUEL RUIS, LUIS PASMINO, HENRY MALATESTA, JOSE GONZALES, and PATRICK BYRNE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Should this Court review the decision below, which, consistent with the reasoning of this Court and with decisions of the Courts of Appeals, correctly determined that, where there is great potential for conflict with the economic policy and commercial law of a friendly sovereign State and the effect on U.S. foreign commerce is minimal, the Federal court should not exercise jurisdiction over a putative antitrust claim?*

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*Bank of America National Trust and Savings Association is a wholly owned subsidiary of BankAmerica Corporation.

BankAmerica Corporation owns, directly or indirectly, more than 50 percent but less than 100 percent of the voting stock of the following:

Banca d'America e Italia
BancAmerica Options, Inc.
BA Australia Limited
Bamerical Investments (Australia) Limited
Bamerical Nominees (Australia) Proprietary Ltd.
BA Oil and Gas Management Ltd.
BA (Australia) Holding Proprietary, Ltd.
BA Investors Mgt. Ltd.
BA Australia Leasing Ltd.
Bamerical Proprietary Ltd.
BA (Australia) Hong Kong Ltd.
Bank of America Cameroon

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PRELIMINARY STATEMENT

Petitioners have not set forth a single ground for the granting of certiorari which merits serious consideration. The balancing test for exercising jurisdiction applied by the court below is consistent with the reasoning of this Court and the Courts of Appeals, and has been approved by each Court of Appeals that has considered the question. Thus, no conflict exists.

Further, the balancing approach employed below has received approval by the Legislative and Executive branches of Government. Not only have the Department of

Justice, the Federal Trade Commission and the Department of State endorsed the approach, but also Congress, in amending the Sherman Act in 1982, expressly approved what the court below did here: "employ notions of comity or otherwise . . . take account of the international character of the transaction" (H.R.Rep. 97-686, 97th Cong., 2d Sess. (1982), p. 13). In short, no reason for review exists.

STATEMENT OF THE CASE

Petitioners' statement of the case ignores the evidence and merely repeats the unsupported allegations made by petitioners for more than 12 years. The relevant *facts*, however, are largely undisputed, and are summarized in the 1983 opinion of the district court (Petn.Appx. C-1-87) and the 1984 opinion of the Court of Appeals (Petn.Appx. B-1-35).[1] They are as follows.

In 1971, petitioner Timberlane Lumber Company ("Timberlane") formed two Honduran companies (petitioners Maya Lumber Company, S. de R.L. ("Maya") and Danli Industrial, S.A.) as investment vehicles with respect to the Honduran lumber business (Petn.Appx. C-6-7). Maya was organized to purchase assets of another Honduran lumber company, Lima e Hijos, S.A. (the "Lima company"), which was not operating because of liquidity and management problems (Petn.Appx. C-5).

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[1] In 1977, the Court of Appeals remanded the action for discovery and further findings (*Timberlane Lumber* v. *Bank of America* (9 Cir. 1977) 549 F.2d 597 (*"Timberlane I"*), Petn.Appx. D-10-14). Thereafter, the courts below applied a "rigorous standard" of proof to respondents' jurisdictional challenge (see *Timberlane Lumber* v. *Bank of America* (N.D.Cal. 1983) 574 F.Supp. 1453 (*"Timberlane II"*), Petn.Appx. C-25 n. 24; *Timberlane Lumber* v. *Bank of America* (9 Cir. 1984) ..... F.2d ..... (*"Timberlane III"*), Petn.Appx. B-17 n.2) Many of the facts in the record are admissions of petitioners on tape recordings they made of their own conversations.

The Honduran branch of respondent Bank of America National Trust and Savings Association (the "Bank") had been one of the Lima company's secured lenders. When the Lima company ceased operations, it owed the branch a substantial debt which was secured by a *hipoteca de empresa,* an all-inclusive Honduran mortgage (Petn. Appx. C-10). As the result of Honduran foreclosure proceedings filed by creditors of the Lima company (including other banks), a judicial decree was issued that the Lima company assets be sold at public auction to satisfy the creditors' claims (Petn.Appx. C-14). No such auction was held, however; the assets were surreptitiously conveyed to Maya (ibid.).[2]

Honduran counsel advised the Bank's Honduras branch that Maya's title to the Lima company assets was defective and that the Bank's *hipoteca de empresa* still encumbered the Lima company assets in Maya's custody. A collection effort was undertaken, and the Bank caused its security interest to be assigned to a local collection agent (Petn. Appx. C-17-18). The ensuing judicial proceedings in Honduras were protracted. Ultimately, the assets were sold at a judicial auction. A final and complete settlement of the Honduran litigation was reached in 1977 (Petn.Appx. C-24).

Unsuccessful in their efforts to defeat the creditors' rights actions against Maya in Honduras, petitioners filed an action in U.S. District Court, alleging that the conduct of the Bank's Honduran branch and others in Honduras aborted petitioners' plans to mill lumber in Honduras and export it to the United States, in violation of the U.S.

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[2]Maya's manager was heard on tape to urge that petitioners "snake" the Lima company assets out from under the legitimate Honduran creditors. The objective was to defraud those creditors, and contemporaneous documents spoke of petitioners' plan to obtain the $2 million worth of Lima company assets "for a song."

antitrust laws. In 1974, the district court granted a motion to dismiss and entered judgment on the ground, inter alia, that there was "no direct and substantial effect on United States foreign commerce" (Appendix A hereto).[3] On appeal, the Ninth Circuit ruled in *Timberlane I* that a simple "effects" test was inadequate in international cases because it failed to take into account possible adverse consequences for American foreign policy, and vacated the first judgment (Petn.Appx. D-42-77).

On remand, the district court found that, even assuming the truth of petitioners' allegations about the quantity of commerce affected, there was no more than a *de minimis* effect on foreign commerce (Petn.Appx. C-78-79; also see id. at pp. C-62-63 ("infinitesimally small quantity")). Its holding, however, was based on additional factors. In particular, the government of Honduras had issue a Diplomatic Note, expressing

> "the concern which has been caused to the Government of Honduras in that there is being litigated in a court of the United States, on the basis of a North American law which not only is inapplicable in Honduras but is contrary to the principles of local legislation, a case which has already been decided in legal form by the courts of the Republic with reference to activities

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[3]While that judgment was on appeal, related (but not consolidated) tort actions were filed by Maya and Danli managers, petitioners Ardon, Lima and Smith, but dismissed on grounds of forum non conveniens. Those dismissals were vacated in *Timberlane I*, reinstated by the district court on remand and affirmed in the Court of Appeals 1984 opinion. Petitioners do not seek certiorari as to the related Federal tort actions (see generally Petn.).

In 1975, petitioners filed an action in the California state courts based on the same conduct. After some discovery, that action was dismissed on grounds of forum non conveniens and affirmed on appeal in an unreported opinion. The California Supreme Court denied a hearing and petitioners did not seek certiorari of that decision.

> carried on under its jurisdiction and which affects a Honduran natural resource, that is timber, which is by law under the control and oversight of the government of the nation itself" (CR: 343, Exh. 5).

The court found potential for "needless tensions" with Honduras (Petn.Appx. C-83), and ruled:

> "Regard for the codification of [Honduras'] cultural, business and ethical mores, as well as the integrity of its system of justice leads us inextricably to conclude that we need DISMISS these actions" (Petn.Appx. C-87).

The Court of Appeals affirmed (Petn.Appx. B). It too found that the "actual effect of Timberlane's potential operations on United States foreign commerce" was "insubstantial, even in the narrow pine lumber market" (Petn. Appx. B-30; also see id., p. B-29 ("miniscule effect")). Moreover, the record failed to reveal either intent to affect foreign commerce or foreseeability of such effect:

> ". . . Bank of America's acts were directed primarily toward securing a greater return on its investment. Its actions were consistent with Honduran customs and practices. . . .
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> • • •
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> ". . . Bank of America simply enforced its mortgage in an attempt to recoup its investment. . . . We do not believe that a reasonable investor would have foreseen the minimal effect that has occurred here" (Petn.Appx. B-31-32).

The Court of Appeals was also concerned about a "significant conflict with Honduran law and policy" (Petn.Appx. B-26; also see id., p. B-33), and, for all these reasons, affirmed. On February 1, 1985, the Court of Appeals denied a petition for rehearing (Petn.Appx. A).

ARGUMENT

The ruling below is wholly consistent with the reasoning of the decisions of this Court and the Courts of Appeals.

The Court of Appeals in *Timberlane I* correctly set forth criteria which, in international antitrust cases, allow the district court to evaluate serious concerns expressed by foreign governments:

> "A tripartite analysis seems to be indicated. . . . [T]he antitrust laws require in the first instance that there be *some* effect—actual or intended—on American foreign commerce before the federal courts may legitimately exercise subject matter jurisdiction under those statutes. Second, a greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the plaintiffs and, therefore, a civil *violation* of the antitrust laws. . . . Third, there is the additional question which is unique to the international setting of whether the interests of, and links to, the United States—including the magnitude of the effect on American foreign commerce—are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority" (Petn.Appx. D-62-63; citations omitted).

As the Court of Appeals explained, this kind of balancing "is especially required in private suits [because] . . . there is no opportunity for the executive branch to weigh the foreign relations impact, nor any statement implicit in the filing of the suit that that consideration has been outweighed" (Petn.Appx. D-66-67). This procedure provides a safety valve for the rare case, like this one, which has the potential for creating a serious, and needless, diplomatic rift with a friendly sovereign. No Court of Appeals that has considered the desirability of applying such balancing in similar circumstances has opposed it. To the contrary,

at least four other circuits (and district courts in a fifth) have concluded that such balancing provides a useful and appropriate framework.

I

THE RESULT IN THIS CASE IS CONSISTENT WITH THE REASONING OF THIS COURT'S PRECEDENTS AND WITH DECISIONS FROM THE COURTS OF APPEALS.

Petitioners' action was dismissed on jurisdictional grounds because, on balance, there was insufficient nexus to the United States (as compared to Honduras) and a serious potential for conflict with the government of Honduras. After several years of full discovery, petitioners were unable to show any intended effect, any reasonably foreseeable effect, or anything more than a *de minimis* actual effect on U.S. foreign commerce. Moreover, the conduct giving rise to the alleged claims and all the substantial effects occurred in Honduras. Petitioners are unable to cite one case in which jurisdiction has been exercised in such circumstances, and there is none.

The decisions of this Court establish that concerns about foreign policy implications require there be some limits on the exercise of Sherman Act jurisdiction in foreign commerce cases. This Court first noted in *American Banana Co.* v. *United Fruit Co.* (1909) 213 U.S. 347, that it was "surprising to hear it argued" that the Sherman Act governed acts outside the United States (id. at 355). Subsequent cases have held that, with limitations, extraterritorial conduct could be subject to Sherman Act scrutiny, i.e., where the alleged conspiracy is hatched in the United States and there are effects on U.S. commerce (see *Continental Co.* v. *Union Carbide* (1962) 370 U.S. 690, 704-706).[4]

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[4]Here, the district court found "no evidence linking the home office of the Bank to any anticompetitive scheme" (Petn.Appx. C-64).

For many years, Judge Learned Hand's opinion in *United States* v. *Aluminum Co. of America* (2 Cir. 1945) 148 F.2d 416 has also been recognized as a leading statement of applicable principles. That decision held that Sherman Act jurisdiction was appropriate where defendants' foreign conduct both was intended to and did cause substantial effects in the United States (148 F.2d 443-445). (Petitioners have failed in 12 years of litigation to make such a showing.) In so holding, however, the *Alcoa* court recognized that foreign policy considerations impose limitations on cases alleging Sherman Act jurisdiction for conduct abroad. In particular, the *Alcoa* court hypothesized an agreement abroad which (as the courts found in this case) was not intended to affect U.S. imports, but which might have some repercussions in the United States and concluded:

> "[W]hen one considers the international complications likely to arise from an effort in this country to treat such agreements as unlawful, it is safe to assume that Congress certainly did not intend the Act to cover them" (148 F.2d 443).

Potential international complications have been acknowledged by this Court and led the Court of Appeals to conclude in *Timberlane I* that jurisdictional rulings in foreign commerce cases require delicate handling.[5]

Contrary to petitioners' suggestion in their third question for review, *Timberlane I* does not give the district courts

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[5]Compare the citations of secondary authorities Fugate and Brewster cited in *Continental Co.* v. *Union Carbide*, 370 U.S. 690, 705, with those cited in *Timberlane I*, Petn.Appx. D-42, n. 12, et seq. The *Timberlane I* court expressly relied upon *Continental Co.* v. *Union Carbide* (Petn.Appx. D-67-68).

"unbridled discretion" to abstain.[6] Rather, the district court balances the relevant criteria and national interests, and its decision is subject to plenary review by the Court of Appeals.[7]

Each circuit that has considered balancing national in-

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[6]Cf. *Timberlane III*, Petn.Appx. B-18-19 & n. 3; *Industrial Inv. Development Corp.* v. *Mitsui & Co.* (5 Cir. 1982) 671 F.2d 876, 884-885, n. 7, vacated on other grounds (1983) 460 U.S. 1007, holding reinstated (5 Cir. 1983) 704 F.2d 785, certiorari denied (1983) ..... U.S. ....., 104 S.Ct. 394).

[7]Petitioners argue that the *Timberlane* test is "completely inappropriate," citing a law review article by James M. Grippando (Petn., p. 45), which was written before *Timberlane II or Timberlane III*. Mr. Grippando's primary concern is that foreign remedies may not include treble damages. This is precisely the source of much international conflict over the jurisdictional reach of the Sherman Act. More important, however Mr. Grippando argues *for* "interest balancing embodied in the judicial abstention tests" because it "better accommodates sensitive foreign relations concerns than does the traditional [simple] effects doctrine" (Declining to Exercise Extraterritorial Antitrust Jurisdiction on Grounds of International Comity: An Illegitimate Extension of the Judicial Abstention Doctrine, 23 Va.J.Int'l L. (1983) 395, 428). But he urges interest balancing under a "choice of law" approach. Mr. Grippando's distinction is therefore one of form, not substance (cf. id., p. 423 ("functionally similar")), and would have made no difference in application in this case (see Petn.Appx. C-80-83 (district court findings on availability and adequacy of alternative forum)). Finally, Mr. Grippando notes that where "the balance of relative national interests tip against the United States," as the Court of Appeals here held (Petn.Appx. B-33-34), "federal regulatory statutes should not receive extraterritorial application" (23 Va.J.Int'l L. 428 n. 167). In short, Mr. Grippando's analysis supports respondents, not petitioners.

terests in determining Sherman Act jurisdiction over foreign commerce cases has endorsed the concept:[8]

- In *Montreal Trading Ltd.* v. *Amax Inc.* (1981) 661 F.2d 864, 869, the Tenth Circuit held that *Timberlane I* "contains the proper elements for consideration";
- In *Mannington Mills, Inc.* v. *Congoleum Corp.* (1979) 595 F.2d 1287, 1297-1298, the Third Circuit adopted a similar balancing test;
- In *In re Uranium Antitrust Litigation* (1980) 617 F.2d 1248, 1255, the Seventh Circuit said the balancing test "certainly provide[s] an adequate framework for such a [jurisdictional] determination";[9] and
- In *Industrial Inv. Development Corp.* v. *Mitsui & Co.* (1982) 671 F.2d 876, 884 n. 7, vacated on other grounds (1983) 460 U.S. 1007, holding reinstated

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[8]In addition, several district courts in the Second Circuit have invoked *Timberlane I* principles (*Dominicus Americana Bohio* v. *Gulf & Western* (S.D.N.Y. 1979) 473 F.Supp. 680, 687 ("proper standard is a balancing test"); *National Bank of Canada* v. *Interbank Card Ass'n* (S.D.N.Y. 1980) 507 F.Supp. 1113, 1119 ("parties are in agreement that the applicable criteria are provided by [*Timberlane I*]"); *Power East Ltd.* v. *Transamerica Delaval, Inc.* (S.D.N.Y. 1983) 558 F.Supp. 47, 49 ("see" cite)). On appeal from the dismissal in the *National Bank* case, the Second Circuit affirmed on the basis that there was no anticompetitive effect on U.S. foreign commerce (*Nat. Bank of Canada* v. *Interbank Card Ass'n* (2 Cir. 1981) 666 F.2d 6, 8 ("[w]ithout questioning the pertinence of the third [balancing] test identified in *Timberlane*")). See also *Bulk Oil (Zug) A.G.* v. *Sun Company, Inc.* (S.D.N.Y. 1983) ..... F.Supp. ....., n. 4 (available on LEXIS, Genfed).

[9]The *Uranium* decision did not involve a specific challenge to jurisdiction. Rather, the defendants did not appear and defaulted, making sensible balancing difficult if not impossible (see J. Atwood & K. Brewster, Antitrust and American Business Abroad (2d Ed. 1981) p. 173)). In those circumstances, the Seventh Circuit declined to find that the trial court had abused its discretion by not balancing national interests (617 F.2d 1256).

(5 Cir. 1983) 704 F.2d 785, certiorari denied (1983) ..... U.S. ....., 104 S.Ct. 394, the Fifth Circuit "commend[ed]" the analysis in *Timberlane* and *Mannington Mills*. But, the court concluded, the *Mitsui* defendants had set forth "a series of mere assertions, unsupported by the pleadings or by summary judgment evidence" (671 F.2d 885), which failed to satisfy the *Timberlane* test.

Petitioners' argument that the different results in *Mitsui* and *Timberlane* justify review by this Court (Petn., pp. 44-47) is erroneous. The different records compelled the different appellate treatments under the same legal standard.[10] In contrast to *Mitsui*, the record here contains abundant evidence of the potential conflict with foreign (Honduran) law. This was one of the matters of concern expressed by the Honduran government in its Diplomatic Note (see p. 5, supra), and recognized by the district court (see Petn.Appx. C-53-54 n. 31, C-75-85). That conflict was also forcefully stated in the opinion of a leading comparativist, Eduardo White (which was paraphrased in the Court of Appeals decision, see Petn.Appx. B-24-25):

"[C]ertain practices restricting competition and obviously condemned by the United States antitrust laws,

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[10]This difference is underscored by petitioners' own synopsis of the cases (Petn., pp. 46-47):

"In *Timberlane* the court found that the 'enforcement of United States antitrust laws in this case would lead to a significant conflict with Honduran law and policy' [*Timberlane III*, 749 F.2d 1384] while in *Mitsui* the court said that neither the Indonesian court's nullification of [plaintiffs'] joint venture agreement with Telaga Mas nor the Indonesian government's action in cancelling its approval of [plaintiffs'] joint venture . . . has been shown to have been [an] approval of defendants' efforts to destroy the joint venture agreement . . .' 671 F.2d at 885."

> are accepted and even encouraged by the economic environment and legal organization of Honduras. . . .
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> "[M]y opinion is that the enforcement of the United States antitrust laws to business activities in Honduras clearly would be contrary to the principles and rules of Honduras and would be considered under the legislation of that country to be an unjustified intrusion into those activities" (CR:292, paragraphs 11, 17).

Contrary to petitioners' contention (see Petn., pp. 33-41), this case, as the district court noted, is "easily distinguishable" from the district court order which was affirmed in *Laker Airways* v. *Sabena, Belgian World Airlines* (D.C. Cir. 1984) 731 F.2d 909 (Petn.Appx. C-45 n. 28). In *Laker*, jurisdiction over the Sherman Act claims was "beyond dispute" (731 F.2d 925) given the conduct which occurred in the United States and the magnitude of the adverse effects the alleged conspiracy had on U.S. consumers and U.S.-based creditors (731 F.2d 923-925). The sole issue was whether a foreign court could enjoin prosecution of ongoing United States litigation and thereby supersede the conceded subject matter jurisdiction of the Federal court (731 F.2d 920-921). In that context, the *Laker* majority rejected defendants' argument that principles of comity required the Federal court to defer to the foreign court's injunction, and to dissolve a U.S. antisuit injunction, because the "foreign act [to which deference was requested] is inherently inconsistent with the policies underlying comity" (731 F.2d 937).

Thus, *Laker* and *Timberlane* are consistent, and do not, as petitioners now argue (Petn., pp. 33-41), create a conflict warranting review by this Court.[11] This is borne

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[11]Petitioners did not even refer to the decision of the District of Columbia Court of Appeals when they petitioned for rehearing from *Timberlane III*, although *Laker* had been decided some ten

out by the *Laker* court's explanation that:

> "[I]f the anticompetitive aspect of the alleged injury is not appreciable; the contacts with the United States are attenuated; and the actions of foreign governments denote the existence of strong foreign interests [—the very circumstances of *Timberlane*—], then comity may suggest a lack of Congressional intent to regulate the alleged conduct. In this context, comity may have a strong bearing on whether application of the United States antitrust laws should go forward" (731 F.2d 938).

II

THE EXECUTIVE BRANCH HAS ENDORSED THE TIMBERLANE APPROACH AND LEGISLATIVE HISTORY OF THE 1982 AMENDMENTS TO THE SHERMAN ACT ESTABLISHES LEGISLATIVE INTENT TO PERMIT COURTS TO EMPLOY COMITY.

The *Timberlane* approach to foreign commerce Sherman Act cases has received strong endorsements from the U.S. Department of Justice, the Federal Trade Commission and the U.S. Department of State.[12]

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months earlier. Petitioners' argument (Petn., p. 40) is borrowed from a newspaper article by two lawyers who confuse the *Laker* defendants' comity argument (which was rejected) with the court's holding on subject matter jurisdiction. Moreover, their attack on the application of *Timberlane's* jurisdictional rule of reason is based on two erroneous statements: (1) that the *Timberlane* conclusions about the effect on commerce rested on a resolution of conflicting evidence when in fact they were based on the assumed truth of petitioners' assertions, and (2) that discovery on remand was limited to the jurisdictional issue. Their conclusions are therefore entitled to no weight.

[12]E.g., Antitrust Division, United States Dept. of Justice, Antitrust Guide for International Operations (1977), pp. 6-7; Statement of William F. Baxter Before House Subcommittee on Monopolies and Commercial Law, Committee on the Judiciary, November 19, 1981; Shenefield, The Perspective of the U.S. Department of Justice, in

Likewise, Congress has manifested its approval of *Timberlane*. In 1982, Congress enacted section 7 of the Sherman Act (15 U.S.C. § 6a), limiting jurisdiction to export claims having "direct, substantial and reasonably foreseeable effect" on U.S. foreign commerce.[13] How the amendment will affect future cases is not entirely clear. But the legislative history of the amendment demonstrates that Congress recognized the importance of the courts' applying the rules of comity:

> "If a court determines that the requirements for subject matter jurisdiction are met, this bill would have

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Perspectives on the Extraterritorial Application of U.S. Antitrust and Other Laws," (J. Griffin, Ed. 1979) 12, 22-24; Remarks of John H. Shenefield, "Extraterritorial Impact of U.S. Antitrust Laws," before the ABA Section of International Law (Aug. 9, 1978), reprinted in CCH Trade Reg.Rptr., Current Comment Transfer Binder, ¶ 50,386, at p. 55,857; Remarks by John H. Shenefield, International Law Institute and the International Law Section of the American Bar Association (Dec. 10, 1980) reprinted in CCH Trade Reg.Rptr., Current Comment Transfer Binder, ¶ 50,424, at p. 55,959; Remarks by Alexander W. Sierck, Director of Trade Policy, Antitrust Division, World Trade Institute, New York (Sept. 6, 1979), p. 9; W. F. Baxter, Responses to Questions Submitted by the Committee on the Judiciary (March 23, 1981), pp. 15-16 ("I agree with the trend of recent case law which acknowledges the need for United States courts to consider and weigh foreign interests before asserting jurisdiction in antitrust cases involving conduct beyond our borders"); Remarks of Commissioner Robert Pitofsky, The Bar Association of Greater Cleveland, Antitrust Compliance Seminar (April 28, 1981), pp. 7-8 ("I think the *Timberlane* approach is right.").

As for the Department of State, see, e.g., Letter of J. Brian Atwood, Assistant Secretary of State, to Senator Edward M. Kennedy, Chairman of the Senate Committee on the Judiciary (Sept. 27, 1979), reprinted in S.Rep. No. 444, 96th Cong., 1st Sess. (1979), 118; see Letter of Roberts B. Owen, Legal Adviser of the Department of State, to John H. Shenefield, Associate Attorney General (March 17, 1980), reprinted in 74 Am.J.Int'l.L. (1980) 665.

[13]The text of the statute is set forth in the statutory appendix (Appendix B hereto).

> no effect on the courts' ability to employ notions of comity or otherwise to take account of the international character of the transaction. Similarly, the bill is not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist . . ." (H.R.Rep. 97-686, 97th Cong., 2d Sess. (1982), p. 13).

See also *Laker Airways* v. *Sabena, Belgian World Airlines,* supra, 731 F.2d 946 n. 137. Thus, Congress has said that it is appropriate for the courts to apply the *Timberlane* approach in cases like this one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,
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Of Counsel

(Appendices follow)

APPENDIX A

United States District Court for the
Northern District of California
No. C-73-0792 L.H.B.
Civil

The Timberlane Lumber Company, an Oregon
Partnership; Danli Industrial, S.A.,
a Honduras corporation;
Maya Lumber Company, S. de R.L.,
a Honduras corporation,
Plaintiffs,

vs.

Bank of America National Trust and Savings
Association, a National banking association;
Bankamerica Corporation, a California corporation;
Pedro Casanova E Hijos, S.A.,
a Honduras corporation;
Importadore Mayorista, S. de R.L.,
a Honduras corporation;
Michel Casanova; Nasser Bonheur, Manuel Ruis;
Louis Pasmino; Henry Malitesta; Jose Gonzales;
Patrick Byrne; and Does I to X Inclusive,
Defendants.

[Filed Mar. 20, 1974]

JUDGMENT

Defendants' motion to dismiss came on for hearing before this Court, the Honorable Lloyd H. Burke presiding, and the matter having been submitted by the parties for decision, and a decision having been duly rendered and announced by the Court at the hearing,

The Court having concluded that it is prohibited under the act of state doctrine from examining the acts of a foreign sovereign state; and in any event, that there is no direct and substantial effect on United States foreign commerce,

It is hereby ORDERED, and ADJUDGED that plaintiffs take nothing and that the action be dismissed on the merits. Each party will bear its own costs.

Dated: March 20, 1974

LLOYD H. BURKE

United States District Judge

APPENDIX B

SHERMAN ACT, § 7 (15 U.S.C. § 6a)

Conduct involving trade or commerce with foreign nations

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.